84-1894 (1)

Office - Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RONALD LEE SADE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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34 pgs

QUESTION PRESENTED

Whether the Due Process Clause is violated when the accused enters a guilty plea on the express condition he will be permitted to argue sufficiency of the evidence issues on appeal, yet the law of the state does not permit such argument.

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TO THE CALIFORNIA SUPREME COURT

OPINION BELOW

On April 3, 1985, the California Supreme Court denied petitioner's Petition for Hearing in case number AO22288 without an opinion. (Appendix A.)

The lower court's decision on the issue raised was rendered without opinion and these summary denials also appear in the Appendix. (Appendix B.)

The opinion of the California Court of Appeal, not for publication, appears in

the Appendix hereto. (Appendix C.)

JURISDICTION

The judgment of the California Court of Appeal was filed on January 23, 1985. The motion at issue here had been earlier denied by that court on May 3 and May 30, 1984. A timely filed Petition for Hearing in the California Supreme Court was denied on April 3, 1985. This Petition for Writ of Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

California Penal Code §1237.5

> "No appeal shall be taken by defendant from a judgment of conviction upon a plea of guilty of nolo contendere, or a revocation of probation following an admission of violation, except where
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk."

STATEMENT OF THE CASE

As a condition of his guilty plea to various narcotics offenses, Mr. Sade was promised that a certificate of probable cause would issue preserving all matters raised in pre-plea motions for appeal. Plea Transcript (Proceedings of January 3, 1983) at 3:19-21, hereinafter PT. The trial court signed such a certificate purporting to preserve the dismissal issues for appeal. Clerk's Transcript at 982, hereinafter CT. The issues raised in petitioner's dismissal motion involved sufficiency of the evidence. CT. 833-839.

Pursuant to the authority of People vs. Geitner (1982) 139 Cal.App.3d 252, appellate counsel submitted to the California Court of Appeal a Motion for Summary Reversal along with the opening brief. The motion was denied without comment. (See Appendix B.)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be granted. The petitioner's guilty plea was specifically induced by a promise that he would have the right to bail pending appeal and that he would be able to appeal the denial of his Motion to Dismiss (Calif. Penal Code §995). The judge signed a certificate of probable cause because he believed the petitioner would be able to appeal the denial of this motion as outlined in the plea bargain.

Petitioner was not able to appeal the denial of his motion reviewing the sufficiency of the evidence. Therefore, he has been denied the benefit of his plea bargain and should be allowed to withdraw his guilty plea.

/

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/

/

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH SANTOBELLO VS. NEW YORK (1971) 404 U.S. 257 AND OTHER DECISIONS OF THIS COURT INVOLVING GUILTY PLEAS

In Santobello vs. New York (1971) 404 U.S. 257 this court held that where a prosecutor fails to keep promises made to an accused at the time of his guilty plea, the Due Process Clause is violated whether or not the prosecutor's conduct was inadvertent. 404 U.S. 262-263. See also Blackledge vs. Allison (1977) 431 U.S. 63 (where state prisoner sought habeas corpus relief on grounds his guilty plea was induced by an unkept promise, he was entitled to some type of hearing in district court); Brady vs. United States (1970) 397 U.S. 742, 755 (stating applicable standard for judgment voluntariness of plea).

Here the trial judge kept his promise to sign a certificate of probable cause for petitioner's appeal, CT. 982, but the court was apparently unaware that it was

impossible for it to preserve dismissal issues going to sufficiency of the evidence by this or any other method. See, e.g., People vs. Kaanehe (1977) 19 Cal.3d 1, 9; People vs. DeVaughn (1977) 18 Cal.3d 889, 896 (guilty plea waives all sufficiency issues). Thus, it is indisputable on this record that petitioner's plea was fundamentally defective by the Brady, supra, standard. Although the trial court's error was probably inadvertent, pursuant to Santobello, supra, petitioner is entitled to relief. The failure of the lower state courts to grant relief, or even to comment on the issue, in the face of explicit authority mandating remand for withdrawal of plea, People vs. Geitner (1982) 139 Cal.App.3d 252, is inexplicable. Whatever the reason, it is clear the state courts have failed to follow the Constitution as interpreted by this Court, and the Court should exercise its discretion to correct this fundamental error.

/

/

CONCLUSION

Counsel respectfully submit a Writ of Certiorari should issue to review the decision of the California Court of Appeal summarily denying petitioner's request for reversal.

Respectfully Submitted,

VICTOR D. VERTNER
Attorney for Petitioner

VDV:ps

5/10/85

APPENDIX A

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

Apr - 3 1985

I have this day filed Order:

HEARING DENIED

In re: _____ No. A022288

PEOPLE

vs.

RONALD LEE SADE

Respectfully,

Clerk

APPENDIX B

Court of Appeal of the State of California
IN AND FOR THE
First Appellate District
Division One

COPY

People of the State of California,	)	F I L E D
	)	May 3, 1984
	)	Court of Appeal-
Plaintiff and Respondent,	)	First App. Dist.
	)	CLIFFORD C. PORTER,
vs.	)	Clerk
	)	No. A022288
Ronald Lee Sade, et al.,	)	
	)	Santa Clara
Defendants and Appellants.	)	Superior
	)	Court No. 84067

BY THE COURT:

Appellant's motion for summary reversal is denied.

Dated: May 3, 1984

/s/ ELKINGTON, J. Acting P.J.

Court of Appeal of the State of California
IN AND FOR THE
First Appellate District
Division One

COPY

F I L E D
May 30, 1984
Court of Appeal-
First App. Dist.
CLIFFORD C. PORTER,
Clerk

People of the State of California,	)	
Plaintiff and Respondent,	)	
vs.	)	No. A022288
Ronald Lee Sade, et al.,	)	Santa Clara Superior Court
Defendants and Appellants.	)	No. 82586/84067

BY THE COURT:

This court's order of May 3, 1984 denying appellant's motion for summary reversal is amended to reflect the addition of Santa Clara Superior Court Action No. 82586.

Dated May 30 1984

/s/ RACANELLI, P.J.
P.J.

APPENDIX C

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

F I L E D
Jan. 23, 1985
Court of Appeal-
First App. Dist.
CLIFFORD C. PORTER,
Clerk

THE PEOPLE,	(AO22288)
Plaintiff and Respondent	(Sup. Ct. Nos. 82586, 84067)
v.	
RONALD LEE SADE and LORYNN CLAIRE SADE,	
Defendants and Appellants.	

Appellants appeal their convictions of various drug-related offenses.

The judgments are affirmed.

Procedural History

On March 15, 1982, Information No. 82586 was filed in Santa Clara County Superior Court charging appellant Ronald Lee Sade and two codefendants who are not parties to this appeal with violations of Penal Code section 182 (conspiracy) and Health and Safety Code section 11352 (sale of controlled substances). Ronald was also charged with a misdemeanor

violation of Penal Code section 12031, subdivision (a) (loaded weapon in vehicle in public).

On July 6, 1982, Information No. 84067 was filed in Santa Clara County Superior Court charging both Ronald and his wife, appellant Lorynn Sade, with violations of Health and Safety Code sections 11351 and 11378 (possession of controlled substances for sale) and misdemeanor violations of Business and Professions Code section 4143, subdivision (a) (possession of hypodermic). Both entered pleas of not guilty to this information. The People's motion to consolidate the two informations was granted.

Thereafter Ronald and Lorynn filed a motion to suppress pursuant to Penal Code section 1538.5. The motion was heard and later denied.

On January 3, 1983, Ronald and Lorynn changed their pleas to the informations to guilty. On February 25, 1983, Lorynn was placed on formal probation for a

period of two years on condition she serve four months in county jail and pay fines totaling $320. Her sentence was stayed pending appeal, and she was released on her own recognizance. On April 21, 1983, Ronald was sentenced to five years in state prison and released on bail pending appeal.

Both Ronald and Lorynn thereafter filed notices of appeals now before us.

Issues

Appellants challenge the lawfulness of a search and seizure of evidence, conducted pursuant to a warrant. They contend that the People failed to meet their burden to justify the search and seizure by failing to introduce the search warrant at the de novo hearing and that the search warrant should have been quashed due to material omissions.

Failure to Introduce Search Warrant at de novo Hearing

The search warrant was marked as Exhibit D for identification at the preliminary examination, the court rejected the motion to suppress. Exhibit D, the warrant, was

returned to the defense. It appears that the warrant was not introduced into evidence at the de novo hearing on appellants' motion to suppress in the superior court, but, rather, that the transcript of the preliminary examination was introduced as evidence.

Since it was never introduced into evidence, the search warrant is not part of the record before us. On September 23, 1983, appellants filed a motion to augment the record on appeal with the warrant. The motion was granted on October 3, 1983. The Santa Clara County Clerk filed with this court on January 5, 1984, a certificate which stated, in relevant part: "PLEASE! TAKE JUDICIAL NOTICE THAT ON THE ABOVE CASE AUGMENTATION IS COMPLETE. OUR RECORDS SHOW THAT A SEARCH WARRANT THAT COUNSEL HAS REQUESTED WAS RELEASED TO INVESTIGATING OFFICER AT THE PRELIM BEFORE JUDGE ROBERT M. FOLEY, WHO IS NOW A SUPERIOR COURT JUDGE. HEARING WAS ON 5/14/83."[1/]

Appellants argue that since the warrant was not introduced into evidence, the prosecution failed to meet its burden. Appellants make a hyper-technical argument. The cases they cite, which impose the burden on the People to justify searches or seizures from an accused's home, are cases involving warrantless searches.[2/]

When a search is pursuant to a warrant, the burden of establishing the illegality of the search is on the party challenging the search. (See Skelton v. Superior Court (1969) 1 Cal.3d 144, 154-155, fn. 8. See also Badillo v. Superior Court, supra, 46 Cal.2d 269, 272.)

Appellants seem to argue that, since the warrant was not introduced in evidence at the superior court hearing, the burden to justify the search should be imposed on the prosecution, as if the search had been conducted without a warrant. This argument seems to propose an absurd result which would advance no discernible public policy.

Appellants contend also that this court may not consider evidence not presented at the de novo hearing (People v. Wright (1977) 72 Cal.App.3d 328, 344). But the evidence at the superior court hearing did include the transcript of the preliminary examination, at which the warrant was discussed and marked for identification, and there is no dispute that court and counsel treated the search question in the context of the existence of a warrant. Although the warrant itself is not part of the record, the testimonial evidence without contradiction demonstrates that the search was incident to the warrant. The burden, therefore, is on appellants to prove illegality of the search and seizure.

Appellants further contend that "even if it were possible for this Court to overlook these serious errors, this appeal cannot be litigated without the search warrants in the record. An appellant is constitutionally guaranteed 'a "record of sufficient completeness" to permit proper

consideration of [his] claims.' Draper v. Washington(1963), 372 U.S. 487,499; Mayer v. City of Chicago(1971), 404 U.S. 189,194. Clearly, this Court cannot review appellants' claims regarding the search warrants without having them to read. Cf. Kaylor v. Superior Court(1980), 108 C.A.3d 451,457 (where affidavit was illegible, magistrate's review was impossible). Yet it is improper for this Court to read them since they were not made part of the record below. Reversal is warranted on this ground alone."

We conclude, however, that inasmuch as the burden was on appellants to demonstrate the illegality of the search, it is the responsibility of the defense to assure that the warrant, in its possession since July 1, 1982, was made part of the record. We further conclude that the present record is sufficiently clear and explicit as to what the warrant contained for us to conclude that, under the circumstances described, there was no error.

Appellants attempt to draw an analogy to People v. Cagle (1971) w1 Cal.App.3d 57, by arguing that "[T]here, neither the minutes nor the transcript disclosed a stipulation that the preliminary hearing transcript was before the superior court on the suppression motion. References to the transcript were made by both sides at the suppression hearing and in their written points and authorities. From this, the Court of Appeal could have inferred that the preliminary transcript was properly before the superior court. The reviewing court found that it was not required to draw such an inference and concluded emphatically that 'the possibility of [such inferences] should not be relied on by trial courts or attorneys as a substitute for sound practice.' 21 C.A. 3d at 61."

The analogy is flawed. Cagle simply holds that we are not required to draw certain inferences, not that we are precluded from so doing.

Alleged Material Omissions from Search Warrant

The affidavit in support of the warrant was based on events occurring on September 1, 1981, which were revealed in the testimony given at the motion to suppress evidence. On that day, Officer Ronald Brooks of the Redwood City Police Department was working as an undercover narcotics officer. He made arrangements to purchase one quarter of an ounce of cocaine. As a result, he met with Judy Taboada and Gloria Majit at a Sunnyvale address. He gave Taboada $780. She drove away, going to 5379 Ayrshire in San Jose. There she met with appellant Ronald Lee Sade, an unidentified male wearing an orange T-shirt, and a female.

A while after Taboada left the Sunnyvale house, Majit received a telephone call. She ended the conversation by saying "'fine, we'll be there.'" She then told Brooks that Taboada had just left her "connection" and wanted them to meet her in one half hour.

At 7:55 p.m., Taboada drove from the Ayrshire residence back to Sunnyvale. She went to the parking lot of a supermarket and there met with Brooks, Majit, and a confidential informant. She gave Brooks a plastic bag containing approximately six grams of white powder containing cocaine.

At all or substantially all times Taboada was under surveillance by a team of police officers.

On September 4, 1981, a similar set of events took place, which also resulted in a purchase by Brooks of cocaine. On September 9, 1981, Brooks made arrangements to purchase a pound of cocaine. The events of September 9, 1981, culminated in the arrest of Ronald and a search, pursuant to the warrant, which produced the evidence which was the basis for the charges made against appellants.

Appellants contend the warrant should have been quashed due to omissions from the affidavit of material facts. There were, say appellants, essentially three such omissions.

First, "Brooks swore that Sgt. Keech of Santa Clara Police 'maintained constant surveillance with the seller as she drove to the presumed pick-up point and from that point to the delivery point.' . . . [E]mphasis added. However, Sgt. Keech acknowledged in testimony that there had been breaks in the surveillance. . . .

"Secondly, Brooks swore that Keech told him the seller had been seen entering the house at 5379 Ayrshire Drive. . . . Keech testified that hedges made it impossible to see the front of the house and that he did not actually see anyone enter the house. . . . Later he swore that surveillance of the front door would have been possible, but imprudent under the circumstances. . . ."

The third omission, according to appellants, relates to the "orange man": "[¶] Sgt. Keech's report discusses . . . a man in an orange T-shirt who was seen to leave 5379 Ayrshire while the surveillance officers were waiting for the seller to come

out. . . . Although the 'orange man' was a suspect, . . . the officers never found out who he was, . . . and the affidavit does not report his presence."

The People reply to the allegation that the affidavit's reference to constant surveillance was false by noting that surveillance was done by a team of officers which was rotated in order to avoid detection. On occasion, the surveying officer might lose visual contact momentarily.

The trial court found that the affidavit's failure to mention surveillance breaks "cannot be said to substantially interfere with the magistrate's inference-drawing process." The court found the omissions were merely negligent, not intentional.

As to the accuracy of the statement in the affidavit that Taboada was seen entering the Ayrshire residence, The People note that the affidavit does not state that she entered the residence via the front door. The officer testified that he saw her walk

towards the attached garage, the door of which was open. The trial court concluded that "it was a reasonable, logical and valid conclusion that the suspects entered the residence."

Finally, the People suggest that appellants' speculation that the "orange man" may have been a "bag man" who delivered narcotics and thus was an uninvestigated source of narcotics is flawed: "[T]his was a search warrant for the Ayrshire residence, not an arrest warrant for particular persons. Evidence that yet another possible supplier brought contraband to the Ayrshire residence would only enhance probable cause to search the residence. Such evidence could not defeat probable cause to search the residence . . . ."

The trial court determined that "there is no evidence that [the orange man] was connected in anyway [sic] with this case. Even if we speculate that he was a possible participant this does not dispel the existence of probable cause that evidence would be found at the Ayrshire residence."

A search conducted pursuant to a warrant is presumed valid. (Skelton v. Superior Court, supra, 1 Cal.3d 144, 154-155, fn. 8.) The party challenging the warrant affidavit has the burden to prove any omissions were material or intended to mislead the magistrate or made in reckless disregard of the truth. (People v. Kurland (1980) 28 Cal.3d 376, 390, cert. den. (1981) 451 U.S. 987.) The trial court's ruling on the suppression motion necessarily implies a finding that the omissions in question were the product of neither recklessness nor an intent to mislead. The trial court's ruling on the suppression motion is presumed correct and must be upheld if supported by substantial evidence. (People v. Lawler (1973) 9 Cal.3d 156, 160.) Based on the foregoing standard, we conclude that the trial court's ruling should be upheld.

* * *

The judgments are affirmed.

Holmdahl, J.

WE CONCUR:

Racanelli, P.J.

Elkington, J.

FOOTNOTES

1/ The reference to a "5/14/83" hearing date is an obvious typographical error; the correct date is 5/14/82. That May 14, 1982, hearing, of course, preceded the continued hearing on July 1, 1982. At that time the warrant was returned to the defense as shown by the record of the July 1, 1982, hearing and not denied by appellants.

2/ Appellants cite Badillo v. Superior Court (1956) 46 Cal.2d 269, 272, Payton v. New York (1980) 445 U.S. 573, 586 and People v. Ramey (1976) 16 Cal.3d 263, 275-276, cert. den. (1976) 429 U.S. 929.

EDITOR'S NOTE

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No. 84-1894

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Supreme Court, U.S.
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OCT 25 1985
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CLERK

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OF THE

UNITED STATES

OCTOBER TERM, 1984

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Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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No. 84-1894

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

RONALD LEE SADE,

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Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

INTRODUCTION

The People of the State of California, plaintiff and respondent below, submit this Brief in Opposition to the Petition of Ronald Lee Sade, defendant and appellant below, for a Writ of Certiorari.

DECISION BELOW

The Order of the California Court of Appeal, First Appellate District, Division One, denying petitioner Ronald Lee Sade's Motion for Summary Reversal of the Judgment of Conviction, is unreported; it is Appendix B to the Petition.

The Opinion of the California Court of Appeal, First Appellate District, Division One, affirming the Judgment of Conviction, is unreported; it is Appendix C to the Petition.

The Order of the California Supreme Court, denying petitioner Sade's Petition for Hearing, is unreported; it is Appendix A to the Petition.

JURISDICTION

Petitioner purports to invoke this Court's jurisdiction under 28 United States Code, section 1254(1) (Pet. 2). However, section 1254 applies to review

of cases in the Federal Courts of Appeal. Since petitioner seeks review of a State case, jurisdiction of this Court, if any, arises under 28 United States Code, section 1257(3).

QUESTION PRESENTED

Is petitioner entitled to review on certiorari, where he did not present his issue to the State trial court and did not present it as a basis for his direct appeal in the California appellate courts, and where no showing is made that the issue was decided on the merits by any State court?

STATUTES INVOLVED

Under California Penal Code section 995, a criminal defendant can move the trial court to dismiss the charges on the ground that the commitment for trial lacked reasonable or probable cause or was illegal.

Under California Penal Code section 1018, a criminal defendant can move the trial court to permit withdrawal of a plea of guilty or nolo contendere, on the ground that the plea was not freely and voluntarily made.

California Penal Code section 1237.5 provides that a guilty-plea conviction cannot be challenged on appeal unless the defendant has sought, and obtained, a certificate of probable cause.

California Penal Code sections 995 and 1018 are set out in the Appendix to this brief; California Penal Code section 1237.5 is set out in the Petition at pages 2-3.

STATEMENT OF THE CASE

A. State Trial Court Proceedings

Petitioner faced eight criminal charges in two consolidated Informations (Santa Clara County Superior Court Nos. 82586, 84067). The charges were these:

Conspiracy to violate California Health and Safety Code section 11352; violation of California Health and Safety Code section 11352; a further violation of section 11352 (sale, offer to sell, cocaine); a further violation of section 11352, and alleging that petitioner was personally armed with a firearm at the time (Cal. Pen. Code §§ 12022(a) and 1203.06); violation of California Penal Code section 12031(a) (unlawful possession of loaded firearm in a public place); violation of California Health and Safety Code section 11351 (possession of cocaine for sale); violation of California Health and Safety Code section 11378 (possession of methamphetamine for sale); and violation of California Business and Professions Code section 4143(a) (possession of hypodermic needles) (Clerk's Transcript (CT)

001, 214-215, 221, 261-264, 864-873, 885).

On May 11, 1982, petitioner filed a motion in Case No. 82586 "To Dismiss Counts Two and Three of the Information as to Defendant Sade pursuant to Penal Code § 995" (CT 833-840). At the hearing on the motion, the motion was expanded to include Counts One and Four as well (Reporter's Transcript (RT) of June 14, 1982, at 6-7).

On June 22, 1982, the trial court denied the Penal Code section 995 motion (CT 859).

On August 31, 1982, petitioner filed a motion in the trial court to suppress evidence in Case No. 84067 (CT 222). On November 18 and December 1, 1982, the trial court issued orders denying the motion (CT 238-240).

On January 3, 1983, petitioner pleaded guilty to Counts One (amended to

charge violation of California Health and Safety Code section 11350) and Two in Case No. 84067; and pleaded guilty to Counts One, Four and Seven in Case No. 92586, and admitted the weapon clause, in return for a six-year maximum sentence in that case, dismissal of the remaining counts, a grant of bail pending appeal, a stay of the judgment pending appeal, and the issuance by the trial court of "a certificate of probable cause for all matters which were brought up by motion in terms of appeal" (see, RT of January 3, 1983, at 2-3, 17-18).

On April 21, 1983, petitioner submitted to the trial court a notice of appeal and a proposed certificate of probable cause (RT of April 21, 1983, at 8-10; CT 982). The trial court signed the proposed certificate of probable cause (CT 982).

B. Proceedings In The State Appellate Courts

Thereafter, petitioner moved th California Court of Appeal, Firs Appellate District, Division One, to sum marily order reversal of the judgment o conviction. The motion was denied b orders dated May 3 and May 30, 198 (Petitioner's Appendix B).

Petitioner also urged reversal o the judgment on direct appeal. The unre ported opinion of the Court of Appeal affirming the judgment, is Appendix C t the Petition.

On April 3, 1985, the Californi Supreme Court denied petitioner' Petition for Hearing (Petitioner' Appendix A).

SUMMARY OF ARGUMENT IN OPPOSITION TO THE PETITION

The merits of petitioner's complain were not presented to, and were no passed upon by, the California courts

As such, petitioner's complaint is not properly before this Court on Petition for a Writ of Certiorari to review the State court judgment.

ARGUMENT

SINCE PETITIONER'S DUE PROCESS ISSUE WAS NOT PRESENTED TO THE CALIFORNIA COURTS IN SUCH A MANNER THAT IT WAS NECESSARILY DECIDED BY THE CALIFORNIA COURT OF APPEAL WHEN IT AFFIRMED PETITIONER'S CONVICTION, THIS COURT SHOULD NOT ASSUME JURISDICTION TO CONSIDER IT.

Petitioner claims that he is entitled to relief from his California conviction, because his guilty plea was induced by an unfillable promise of appellate review of his pretrial California Penal Code section 995 motion to dismiss charges (Pet. at 6-7).[1/]

1/ California Penal Code section 999a provides for pretrial appellate review of the trial court's denial of a California Penal Code section 995 motion, by means of a Petition for a Writ of Prohibition to the appellate court (see, Appendix A).

(Footnote continued on next page.)

This Court should not consider the issue because it was not presented to th California courts in such a manner tha it was necessarily decided by th California Court of Appeal when i affirmed petitioner's conviction. See Street v. New York, 394 U.S. 576, 581-58 (1968); 28 U.S.C. §§ 1257(2), 1257(3) Bailey v. Anderson, 326 U.S. 203, 206-20 (1945).

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the

---

Footnote 1 continued:

There is no indication that peti tioner sought to avail himself of thi vehicle for review.

aggrieved party in this Court can affirmatively show the contrary. [Citations.]"

Street v. New York, 394 U.S., supra, at 582.

Petitioner does not contend that his due process issue was raised in the trial court. California Penal Code section 1018 permits a pre-judgment motion in the trial court for withdrawal of an improperly induced guilty plea. See, People v. Cruz, 12 Cal.3d 562, 566 (1974); People v. Superior Court (Giron), 11 Cal.3d 793, 797 (1974). There is no indication that petitioner made any such motion in the trial court.

The California Court of Appeal did not mention the due process issue in its opinion when it affirmed petitioner's conviction (Petitioner's Appendix C).

Petitioner makes no claim that the issu
was presented to the Court of Appeal
such a manner that it was necessari
decided by the Court of Appeal when
affirmed petitioner's conviction. Th
is understandable: The due process issu
was not raised at all in petitioner
briefs on the appeal (Appendix C).

Petitioner's guilty plea claim wa
raised in the Court of Appeal only in
"Motion for Summary Reversal," which wa
denied by that court in orders dated Ma
3 and 30, 1984 (Pet. at 3; Petitioner
Appendix B). The orders denying th
Motion for Summary Reversal make no men
tion of petitioner's guilty plea issue
and petitioner makes no claim or showin
that in ruling on the Motion for Summar
Reversal, the Court of Appeal necessari
decided the merits of petitioner's guilt
plea issue. The Court of Appeal's denia
of the motion was not a determination

the merits of the guilty plea claim; it was, instead, a determination not to dispose of the appeal summarily.[2/]

2/ Summary reversal is a procedure by which the appeal is disposed of in a prompt, simple manner, without the aid of full briefing and without observance of all requirements that prevail in a plenary appeal. See, e.g., People v. Browning, 79 Cal.App.3d 320, 323-324 (1978); Melancon v. Walt Disney Productions, 127 Cal.App.2d 213, 215 (1954). California appellate courts have inherent power to entertain a Motion for Summary Reversal in an appropriate case. People v. Browning, 79 Cal.App.3d, supra, at 323; Landberg v. Landberg, 24 Cal.App.3d 742, 746-747 (1972). "Summary determination of a criminal appeal is very rare." People v. Geitner, 139 Cal.App.3d 252, 254 (1982). We are aware of fewer than ten examples in the published California authorities. Summary reversal has been ordered on stipulation of the parties; where the issue has been ruled upon by the Supreme Court and then retransferred to the Court of Appeal for disposition; and where the facts cannot be disputed, controlling legal authority mandates the result and the circumstances justify speedy resolution of the appeal (see, People v. Browning, 79 Cal.App.3d, supra, at 323-324; People v. Geitner, 139 Cal.App.3d, supra, at 254-255; Melancon v. Walt Disney Productions, 127

(Footnote continued on next page.)

The order of the California Suprem Court, denying Sade's Petition fo Hearing, makes no mention of the guilt plea issue (Pet., Appendix A) Petitioner makes no claim or showing tha his guilty plea issue was necessaril decided by the California Supreme Cour when it denied his Petition for Hearin (see, Street v. New York, 394 U.S.

/

Footnote 2 continued:

Cal.App.2d, supra, at 215; see also Landberg v. Landberg, 24 Cal.App.3d supra, at 746-747.

Granting a Motion for Summar Reversal does ". . . not result in technical disposition of the appeal," bu is a speedy determination of the appea (People v. Browning, 79 Cal.App.3d supra, at 323). Denial of a Motion fo Summary Reversal is not a determinatio of the appeal; it is only a refusal t employ a summary procedure in the case See Landberg v. Landberg, 24 Cal.App.3d supra, at 746-747 (Motion for Summar Reversal denied, followed by plenar determination of the issues raised on th appeal).

supra, at 581-582).[3/] Absent such a showing, this Court lacks power to consider it (Street v. New York, 394 U.S., supra, at 582; Hill v. California, 401 U.S. 797, 805 (1970)).

3/ Indeed, it appears that as to petitioner's Motion for Summary Reversal in the Court of Appeal, the Petition for Hearing to the Supreme Court was denied for procedural reasons. First, the Court of Appeal has discretion to grant a Motion for Summary Reversal in the rare case; it is not required to do so. Denial of such a motion is a discretionary act that does not terminate the appeal. As such, the denial of such a motion is not the sort of a determination that is reviewable by a Petition for Hearing to the California Supreme Court (see, former California Rules of Court, Rule 28(b); Rule 29 and Explanatory Note (Appendix E); see also, Dvorin v. Appellate Dept., 15 Cal.3d 648, 650 (1975)).

Even if the denial of the Motion for Summary Reversal was reviewable by a Petition for Hearing to the Supreme Court, the denial of the Petition for Hearing was procedural. The Motion of Summary Reversal was denied by orders issued on May 3 and 30, 1984 (Pet., Appendix B). The Court of Appeal's opinion on the merits of the appeal was

(Footnote continued on next page.)

Since there is no claim or showi
that petitioner's guilty plea issue w
presented to the California courts
such a manner that it was necessari
decided by the California Court of Appe
when it affirmed petitioner's convictio
this Court should dismiss the Petiti
for a Writ of Certiorari for want
jurisdiction. In addition, there a
sound policy reasons for adhering to su
a rule. As stated by this Court in Hi
v. California, supra, 401 U.S. 797 (pet
tion claimed that the admission of ce
tain evidence in state court violated t

Footnote 3 continued:

issued on January 23, 1985 (Pet
Appendix C). The Petition for Hearing
the California Supreme Court was filed
February 26, 1985. The order denying t
Motion for Summary Reversal became fin
long before the opinion on the merits
the Court of Appeal, and could not
presented for review via the February 2
1985 Petition for Hearing. See, Geor
v. Bekins Van and Storage Co., 33 Cal.
834, 850-851 (1949); California Rules
Court, Rule 28(a).

Fifth Amendment), discussing Cardinale v. Louisiana, 394 U.S. 437 (1969):

> "In the context of that case, we indicated the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes. We also indicated that a federal habeas corpus remedy might remain if no state procedure for raising the issue was available following dismissal of the writ. These considerations are no less applicable in this case." 401 U.S. at 805-806.

Here, a State habeas corpus remedy would likely exist following dismissal of the Petition for a Writ of Certiorari, and a Federal habeas corpus remedy might remain if no State procedure was available.

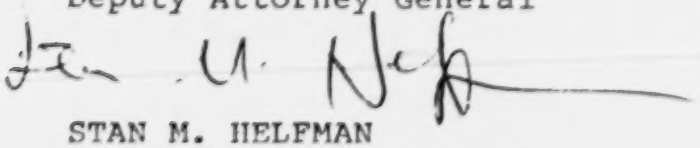
CONCLUSION

The Petition for a Writ of Certiorari should be denied and these proceedings dismissed. We respectfully so request.

DATED: October 25, 1985

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

ANN K. JENSEN
Deputy Attorney General



STAN M. HELFMAN
Deputy Attorney General

Attorneys for Respondent

SMH:pc

APPENDIX A

(1) California Penal Code section 995

(2) California Penal Code section 999a

California Penal Code section 995:

"(a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

(1) If it is an indictment:

(A) Where it is not found, endorsed, and presented as prescribed in this code.

(B) That the defendant has been indicted without reasonable or probable cause.

(2) If it is an information:

(A) That before the filing thereof the defendant had not been legally committed by a magistrate.

(B) That the defendant had been committed without reasonable or probable cause.

(b) In cases in which the procedure set out in subdivision (b) of Section 995a is utilized, the court shall reserve a final ruling on the motion until those procedures have been completed."

California Penal Code section 999a:

"A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, or that the court abused its discretion in utilizing the procedure set out in subdivision (b) of Section 995a, must be filed in the appellate court within 15 days after a motion made under Section 995 to set aside the indictment on the ground that the defendant has been indicted without reasonable or probable cause has been denied by the trial court. A copy of such petition shall be served upon

the district attorney of the county in which the indictment is returned or the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment."

APPENDIX B

California Penal Code section 1018

California Penal Code section 1018:

"Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the

court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by

counsel. This section shall be liberally construed to effect these objects and to promote justice."

APPENDIX C

(1) Index, Petitioner's Opening Brief on Appeal to the California Court of Appeal (A022288)

(2) Index, Petitioner's Reply Brief on Appeal to the California Court of Appeal (A022288)

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APPENDIX D

Petitioner's Petition for Hearing to the California Supreme Court

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No.
v.	)	(1/Crim. A022288)
RONALD LEE SADE and LORYNN CLAIRE SADE,	)	PETITION FOR HEARING
Defendants and Appellants.	)	

TO THE HONORABLE ROSE BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

RONALD LEE SADE hereby petitions the Court for a hearing to review the decision of the Court of Appeal denying peti-tioner's motion for summary reversal and eventually affirming his conviction. A copy of the Court of Appeal's decision affirming petitioner's conviction filed on January 23, 1985 is set forth herein as Exhibit A.

Hearing by this Court is necessary to secure uniformity of decision. A

memorandum of law fully explaining this ground is attached hereto and incorporated by reference herein.

WHEREFORE, petitioner prays a hearing by [sic] granted and his case remanded to the Superior Court with directions to permit withdrawal of his guilty plea.

Dated: 2-25-85

Respectfully submitted

(Signature)
VICTOR D. VERTNER
Attorney for Petitioners
RONALD LEE SADE and
LORYNN CLAIRE SADE

APPENDIX E

Former California Rules of Court, Rules 28(b) and 29, with Explanatory Note

Rule 28. Hearing in Supreme Court

"(a) [Time within which court may grant hearing] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period or any extension thereof the Supreme Court may for good cause extend the time for one or more additional periods not to exceed a total of an additional 60 days.

"(b) [Time for filing petition] A party seeking a hearing must serve and file a petition within 10 days after

the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When a copy is delivered to the clerk of the Court of Appeal, the clerk shall forthwith transmit to the Clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the Clerk of the

Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the Clerk of the Supreme Court."

Rule 29. Grounds for Hearing in Supreme Court

"(a) [Grounds] A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (a) where, because of disqualification or other reason, the decision of the Court of Appeal

lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for hearing the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the brief filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for hearing

without the necessity of filing a petition for rehearing.

(b) [**Examination of record**] New. The requirement that error must appear on the face of the opinion of the D.C.A. is established by a number of decisions, but has never been expressly stated in any rule. Exception have been recognized first, where the case was within the jurisdiction of the Sup.Ct. and was previously transferred to the D.C.A. to expedite appellate business (Burke v. Maze, 10 Cal.App. 206 [105 P. 438, 440]), and second, where the cause was an original proceeding in the D.C.A. and not an appeal (Rockridge Place Co. v. City Council, 178 Cal. 58 [172 P. 1110]). These two

exceptions have been eliminated and two new exceptions are stated: where material facts are omitted or incorrectly stated, or substantial legal issues are not covered in the opinion, the petitioner may refer to the record, provided that he first calls these matters to the attention of the D.C.A. by petition for rehearing."

CERTIFICATE OF SERVICE BY MAIL

RONALD LEE SADE, Petitioner, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	No. 84-1894

STAN M. HELFMAN, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on October 25, 1985, he served a true copy of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in an envelope addressed as follows:

Victor D. Vertner
Attorney at Law
5267 Elrose Avenue
San Jose, California 95124

Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

STAN M. HELFMAN